By analogy, the obiter dictum of Lord Denning to a mortgagee, in my view, should apply equally to a chargee who ought to owe such a similar duty of care in selling by public auction the charged land.

However, in the instant case, the parties were not concerned with the sale of the mining lease in an auction ordered in the foreclosure proceedings, and no question about the best possible price arose. Here the chargee had sued the chargor on a 'personal' covenant to pay. The time to sell, from the dictum of Lord Denning should mean the time in foreclosure proceedings after the court has granted an order of sale by public auction. The *Standard Chartered Bank* case[1] was not strictly applicable to the instant case.

However, in view of the principle of neighbour-in-law of Lord Atkin of the *Donoghue* v *Stevenson*[2] fame, following the reasoning of Lord Denning in *Standard Chartered Bank*,[1] in my view, the duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much as possible any surplus after sale of charged land. Then, the next question to me was whether the plaintiff as chargor had been guilty of any breach of such duty of care.

The court took judicial notice of the fact that from its structure, the chargor was a financially powerful company, it was created and owned by the state government of Perak. The fact was too well-known except to the most uninitiated in matters of commerce in Perak or any other state in Malaysia. The state government has been the issuing or renewing authority of any mining lease in Perak. All these could have played a crucial role in the plaintiff granting the overdraft facility. To renew a mining lease which was to expire soon would obviously be much more for the benefit of the chargor than the chargee in view of personal covenant to pay and the fact judicially noticed by the court. To sell the mining lease, not at the request of the chargor, would amount to the withdrawal of overdraft facility of which the borrower (first defendant) was in dire need. All the circumstances indicated that the plaintiff, as chargee, had not been in breach of the duty of care explained above. I therefore found the second point of the chargor to be of no substance.

It should not require a long and expensive trial to determine the points raised if they could be decided here and now. I therefore dismissed the appeal of the chargor, ie the second defendant with costs.

Appeal dismissed.

Solicitors: *Choong Yik San & Robiha; Maxwell Kenion Cowdy & Jones.*

Reported by *Yap Shao Sin*

Public Prosecutor v Wong Yee Sen & Ors

HIGH COURT (KUALA LUMPUR) — FEDERAL TERRITORY CRIMINAL TRIAL CR NO 58-2-86
FAIZA TAMBY CHIK JC
2 NOVEMBER 1989

Criminal Procedure — Cautioned statement — Not introduced at prosecution stage — Whether prosecution can use cautioned statement of accused during case for defence to impeach credit of accused during cross-examination — Criminal Procedural Code (FMS Cap 6), s 113 — Evidence Act 1950, ss 145, 146 & 155(1) — Dangerous Drugs Act 1952, s 37A

In this case the accused were charged with trafficking in a dangerous drug. At the end of the prosecution's case the court ruled that a prime facie case had been made out and the accused were called to enter upon their defence. The first accused elected to give evidence on oath and during the cross-examination of the accused, the prosecution sought to introduce the cautioned statement of the accused to impeach his credit. Counsel for the first accused objected as he said the cautioned statement had not been admitted in evidence at the prosecution stage.

Held, that the following procedures should be taken as regards the cautioned statement:

(1) A cautioned statement of an accused person, provided that it is voluntary, not introduced during the prosecution's case, can be permitted to be used by the prosecution to impeach the credit of the accused person during the case for the defence.

(2) The cautioned statement of the accused person should be shown to the judge in order for him to determine the contradictory portion in the accused's cautioned statement. If the judge finds material contradiction in the cautioned statement, a trial within a trial should be held to determine the admissibility of the cautioned statement. The said contradictory portion must be proved and brought to record.

(3) The said contradictory portion cannot be admissible as evidence of the fact stated therein except for the purpose of impeaching the accused's credit.

Cases referred to

1 *PP* v *Teng Chen Choi* [1989] 1 CLJ 56 (not folld)
2 *PP* v *Peh Ning Ning* Federal Territory Criminal Trial No 46185 (unreported) (refd)
3 *Dato Mokhtar bin Hashim* v *PP* [1983] 2 MLJ 232 (folld)
4 *Tua Kin Ling* v *PP* [1970] 2 MLJ 61 (folld)
5 *Husdi* v *PP* [1980] 2 MLJ 80 (folld)
6 *Krishnan & Anor* v *PP* [1981] 2 MLJ 121 (folld)
7 *Yusoff bin Sidin* v *PP* [1971] 1 MLJ 203 (folld)
8 *Pavone* v *PP* [1986] 1 MLJ 72 (folld)
9 *Jones* v *Rex* [1948] MLJ 182 (folld)
10 *Muthusamy* v *PP* [1948] MLJ 57 (folld)
11 *Muluk bin Ahmad & Anor* v *PP* [1989] 2 MLJ 151 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 113
Dangerous Drugs Act 1952 s 37A
Evidence Act 1950 ss 145, 146, 155(c)

Jalaludin bin Salleh (Deputy Public Prosecutor) for the Public Prosecutor.
Gulam Mustaffa bin Nadar Ali Khan for the first accused.
Leong Wey Pye for the second accused.

Kartar Singh (*Gurbachan Singh Pannu* with him) for the third accused.

Teh Boon Eng (*Collin Goonting* with him) for the fourth accused.

Sidney Augustin Cyril for the fifth accused.

Cur Adv Vult

Faiza Tamby Chik JC: The issue here is simply this. Can the prosecution be permitted after closing their case but during the case for the defence to use the cautioned statement of an accused person which has not been introduced at the prosecution stage to impeach his credit during the course of his cross-examination by the prosecution?

In this trial, the first accused, Wong Yee Sen, with four others, is facing a charge of trafficking dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the case for the prosecution, I ruled that a prima facie case has been made out and I called upon the accused together with the other four accused persons to enter upon their defence. Then at this stage of the proceeding, the defence applied for this ruling on the cautioned statement of the first accused as well as those three others which have not been part of the evidence for the prosecution who have already closed their case.

I then proceeded to hear the submissions on the defence's application for a court ruling as to whether the prosecution is permitted to use the cautioned statement of the first accused to impeach his credit; the cautioned statement not being part of the prosecution's substantive evidence.

In his submission, Mr Gurbachan Singh Pannu, submitting on behalf of the other four defence counsel, applied for a court's ruling as to whether the prosecution is permitted to use the cautioned statement of the first accused to impeach his credit as stated in s 37A of the Dangerous Drugs Act 1952 after not having used the cautioned statement as part of the case for the prosecution in evidence. Learned counsel submitted that the prosecution could not be allowed to do so unless the cautioned statement was used as substantive evidence earlier in the case for the prosecution. He quoted me two main cases in support of his contention: *PP* v *Teng Chen Choi*;[1] *PP* v *Peh Ning Ning*.[2] Both are the decisions of the Honourable Mahadev Shankar J. He also submitted that s 37A of the Dangerous Drugs Act 1952 should be read conjunctively.

Mr WP Leong, counsel for the second accused, submitted that the prosecution having offered the four recording officers who recorded the cautioned statements of the other four accused persons to the defence, it is up to the defence to use the cautioned statements or not. In his submission, the learned DPP, Encik Jalaludin Saleh, submitted that the two main authorities submitted by the defence are those of High Court rulings and therefore he said are not binding on this court. He again submitted that s 37A of the Dangerous Drugs Act 1952 should be read disjunctively and stressed that s 37A(1), inter alia, states:

> ... if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

The submissions were made on 26 June 1989, the twenty-third day of the trial. When the court met again on 29 June 1989, the twenty-fourth day of the trial, I ruled that that was not the appropriate stage as it was not necessary for me to make such a ruling, as the occasion had not yet arisen at this stage for such a ruling.

Then on the twenty-seventh day of the trial, ie on 1 November 1989, the prosecution in the course of cross-examining the first accused asked, 'Did you make a cautioned statement to the police?', the first accused answered, 'Yes, I did.' 'What did you tell the police in the cautioned statement?' At this stage, defence counsel Encik Gulam Mustaffa for the first accused objected to the question because he said that the cautioned statement has not been admitted in evidence and a ruling by me is yet to be made on this matter. In the circumstances, the learned DPP withdrew the question in expectation of this ruling.

In *PP* v *Teng Chen Choi*,[1] Shankar J said:

> It was not open to the prosecution to utilize the cautioned statement to impeach the accused's credit because to allow the prosecution to initiate a trial within a trial to determine the admissibility of the statement notwithstanding that they have closed their case would be to allow them to reopen their case after they have closed it in order to put the statement in evidence as a prosecution exhibit. Inevitably they will have to call the recording officer to give evidence as a witness for the prosecution.

With all due respect, I must but disagree with my learned brother Shankar J for the following reasons. First, a trial within a trial is a separate exercise entirely, divorced from the main trial; and its main purpose is just to determine the admissibility of the cautioned statement and is not concerned with the truth or untruth of the statement. Secondly, a witness's credibility or credit has to be assessed at the appropriate time, ie at the end of the prosecution's or defence's case, as the case may be. No summary order impeaching the credit of a witness can be made. Abdoolcader FJ (as he then was) in *Datuk Mokhtar bin Hashim* v *PP*[3] said at pp 276-277:

> When a witness's credit is sought to be impugned under the provisions of ss 145 and 155(c) of the Evidence Act 1950 his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should

not be denied as it may well be that on the exercise of such right his credit might be repaired, restored or re-established...

To say therefore that cross-examination would have been a waste of time is not a proposition we can in any way consider acceptable or entertain. We are unable to say what cross-examination would have elicited and what different light it could or might have thrown on the situation, and in this connection consider as pertinent this passage from the judgment of Megarry J in *John* v *Rees* [1970] 1 Ch 345 at 402:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

Abdoolcader J [as he then was] took the correct approach in *PP* v *Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstances.

The Criminal Procedure Code (FMS Cap 6) does not mention impeachment of witnesses except in s 113(1) which provides that where the accused tenders himself as a witness, any cautioned statement made by him may be used in cross-examination and for the purpose of impeaching his credit. Section 37A(1) of the Dangerous Drugs Act 1952 is in pari materia with s 13 of the CPC.

In this case, the first accused went to the witness box and gave evidence on oath and therefore he was caught by s 37A(1) of the Dangerous Drugs Act 1952 which, inter alia, states:

... and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

Cross-examination is the examination of a witness by the adverse party, that is, the party opposed to the one that calls him. What is the aim of cross-examination? Really there is one aim only. It is to assist in the administration of justice by revealing the truth to the court. The function of cross-examination is to eliminate or reduce the danger that a false conclusion will be reached. Wigmore has declared that cross-examination is beyond doubt the greatest engine ever invented for the discovery of truth.

The powers of a cross-examiner generally are:

(1) to ask leading questions (s 143 of the Evidence Act 1950);
(2) to impeach a witness for making a previous inconsistent statement (s 145 of the Evidence Act 1950);
(3) to test a witness's accuracy, veracity and credibility (s 146(a) of the Evidence Act 1950); and
(4) to shake the credit of a witness by injuring his character (s 146(c) of the Evidence Act 1950).

Therefore, if a witness is successfully impeached, the judge may reject his evidence in its entirety; or after sieving the evidence, accept the part considered reliable. (See *Tua Kin Ling* v *PP*.[4]) But this must be done at the end of the case for the prosecution or defence, as the case may be.

Therefore, in the interest of the general administration of justice and the need to ensure fairness and justice in court, which must be paramount, I am of the view that a cautioned statement of an accused person, provided that it is voluntary, not introduced during the prosecution stage, can be permitted to be used by the prosecution to impeach the credit of the accused person during the case for the defence because s 145 and s 155(c) are provided for by the Evidence Act 1950 and are still very much in force. I am fortified in the opinion I arrived at by the fact that Suffian LP sitting with Raja Azlan Shan CJ (as he then was) and Lee Hun Hoe CJ (Borneo) in *Husdi* v *PP*[5] at p 81 said:

Nevertheless, in our view, as ss 145 and 155(c) of the Act have not been repealed, they must be given effect to, and cannot be treated as dead letters. Otherwise, counsel who has a hunch that a *defence witness* has in his oral evidence departed from his *cautioned statement* may not be able to take advantage of the Evidence Act 1950 which allowed — and still allows — the *prosecution* to impeach his credit. Also, in the interest of justice, the court would want to know if a witness has departed significantly from his *cautioned statement*. (The italicised words are mine.)

I am also fortified in the opinion I arrived at by s 157 of the Evidence Act 1950 which states that:

In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Accordingly, I am of the view that before proof of the cautioned statement is undertaken, the judge should be shown the portion in the cautioned statement that are said to contradict the accused's evidence in court for '... as a first step it is essential that the court should be given the discretion to determine a preliminary question whether the witness's former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconciliable with his evidence. We therefore think that it is a good procedure that a judge should be shown the statement as a first step in the impeachment procedure.' (per Salleh Abas FJ (as he then was) in *Krishnan & Anor* v *PP*[6] at p 124).

Sitting in the Federal Court with Lee Hun Hoe CJ (Borneo) and Abdul Hamid FJ (as he then was), Salleh Abas FJ (as he then was) said in the same case at p 124:

> As regards the time when proof of a cautioned statement should be undertaken for the purpose of impeaching the credit of a witness, we are of the view that this could be given either before or after contradicting the witness. The only disadvantage is that if this proof is given after the witness has been contradicted there is always a possibility that the cautioned statement after an inquiry may not be held admissible. In that event, all the previous efforts to impeach credit are lost and become a mere waste of time. It seems therefore preferable that in the case of impeaching the credit of a witness by the use of his cautioned statement, proof of the statement should be given before contradiction takes place.

And, 'The only way in which a previous statement of a witness can be used is by contradicting the witness by such writing and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction. Those parts of the statement which are used for contradicting the witness must be proved and brought on the record.' (per Sharma J in *Yusoff bin Sidin* v *PP*[7]).

I have analysed with the utmost care the role of a cautioned statement of an accused person; if voluntary, it is admissible at his trial in evidence as contained in s 37A of the Dangerous Drugs Act 1952. And I have also addressed myself to the fact that a trial within a trial is not concerned with the truth or otherwise of a cautioned statement and, accordingly, I am of the view that after those portions in the cautioned statement have been proved and brought on the record, they cannot be admissible as evidence of facts stated therein except for the sole purpose of contradicting the accused's evidence at the trial and no more. Otherwise, it would unwittingly form substantive evidence for the prosecution which would be most unfair to the accused as it would be tantamount to the prosecution re-opening their case. The cautioned statement if admissible and the portions in the cautioned statement once proved and brought on the record would be used for the limited purpose of contradiction; in other words, to test his credit and not as substantive evidence.

'By analogy, I would refer to the Privy Council cases of *Briji Bhushan Singh* v *R* AIR 1946 PC 38 and *Mamand* v *Emperor* AIR 1946 PC 45, which are authorities for the proposition that a statement made under s 164 of the Indian Criminal Procedure Code (equivalent to the old s 113 of our Code) used for the purposes for impeaching the credit of a witness cannot be used as substantive evidence.': per Edgar Joseph Jr J in *Pavone* v *PP*[8] at p 74.

I am fortified in my opinion I arrived at by the fact that, ' ... lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.' (per Salleh Abas FJ (as he then was) in *Krishnan & Anor* v *PP*[6] at p 124).

I am also fortified in my opinion by the fact that, 'These statements can only be used to impeach the credit of the witnesses. That is to say, when these statements have been proved, they do not become independent evidence of facts contained in them.' (per Murray-Aynsley CJ in *Jones* v *Rex*[9]).

And therefore, the crucial point for the court to decide at the outset is to determine whether the difference is so material or serious between his evidence in court and his cautioned statement as to suggest the witness is unreliable, 'the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some way that the witness did make the statement. If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubts as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.' (per Taylor J in *Muthusamy* v *PP*[10] at p 59).

To do this the cautioned statement must be proved to have been voluntarily made and therefore a voire dire hearing or as it is commonly called a trial within a trial, must be held in order to determine the issue of admissibility.

I know a trial within a trial is a separate trial; and after the inquiry, the cautioned statement may not be held admissible and consequently the trial within a trial becomes a waste of time. As much as this procedure is cumbersome and slow, I agree with Lee Hun Hoe CJ (Borneo) who has rightly pointed out that, 'If this procedure is considered to be tedious, inconvenient and time-consuming, the proper remedy would be for the legislature to amend the law.' See *Muluk bin Ahmad & Anor* v *PP*[11] at p 153.

I therefore ruled that:

(1) the cautioned statement of the accused person be shown to the judge in order for him to determine the said contradictory portion in the accused's cautioned statement;

(2) if the judge finds material contradiction in the cautioned statement, a trial within a trial be held to determine the caution statement's admissibility;

(3) the said contradictory portion must be proved and brought to record; and
(4) the said contradictory portion cannot be admissible as evidence of fact stated therein except for the sole purpose of impeaching the accused's credit.

Order accordingly.

Solicitors: *Gulam Mustaffa & Co; WP Leong; Bachan & Kartar; Collin Goonting & Co; Augustin Negrin & Co.*

Reported by *Prof Ahmad Ibrahim*

Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd

HIGH COURT (JOHORE BAHRU) — COMPANIES (WINDING-UP) NO 42-144 OF 1988
ABU MANSOR J
9 MARCH 1989

Conflict of Laws — Jurisdiction of the High Court Johore Bahru to hear winding-up petition — Whether petition should be filed in Kuching — Company's registered office in Kuching — Forum convenience — Courts of Judicature Act 1964, s 23(1)(b)

Courts and Procedure — Jurisdiction of the High Court Johore Bahru to hear winding-up petition — Powers of Malaysian judiciary — Place of residence of respondent — Federal Constitution, art 121(1) — Courts of Judicature Act 1964, ss 3 & 23(1)(b)

The respondent company was incorporated on 1 September 1982 and had its registered office in Kuching, Sarawak. The petitioner alleged that the respondent was indebted to the petitioner in the sum of $107,357.66 for the price of goods sold and delivered. On 5 September 1988, the petitioner served on the respondent the statutory notice pursuant to s 218 of the Companies Act 1965 but no payment was received. Hence the petitioner filed the petition to wind up.

Held, striking out the petition:

(1) The issue of which High Court has jurisdiction over a matter is determined by s 23 of the Courts of Judicature Act 1964. It is clear that the respondent, residing in Kuching, would come under s 23(1)(b) of the Courts of Judicature Act 1964.

(2) While matters can be heard in any court of the courts of Malaya, it was not the intention of the legislature for any court in Malaya to assume jurisdiction of a matter arising in or which should be filed in a Borneo court. Since the respondent is residing in Kuching, the matter should really be filed in the Borneo High Court, in particular Kuching.

(3) From the point of view of convenience, Kuching would be more convenient, with the respondent residing there and the witnesses being there.

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 02-72 of 1989.]

Cases referred to

1 *Sova Sdn Bhd* v *Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 (folld)

2 *Syarikat Nip Kui Cheong Timber Contractor* v *Safety Life and General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 (folld)

Legislation referred to

Companies Act 1965 s 218
Courts of Judicature Act 1964 ss 3, 23
Federal Constitution art 121

Ong Ban Chai for the petitioner.
BH Lee for the respondent.

Cur Adv Vult

Abu Mansor J: The petitioner appeals against the order made by this court striking out the petition for the winding up of the respondent company on the ground that the court did not have jurisdiction to entertain the petition or alternatively even if the court had that jurisdiction, it held the forum convenience was elsewhere. The appeal raises the short question whether the petition should really be filed in High Court Borneo.

The facts of the case are as follows. In the petition itself, the petitioner states that the respondent company was incorporated on 1 September 1982. The registered office of the company is at First Floor, Hockien Association Building, Lot 98-99, Green Hill Road, Kuching, Sarawak.

The petitioner alleged that the respondent is indebted to the petitioner in the sum of $107,357.66 for the price of goods sold and delivered. On 5 September 1988, the petitioner served on the company the statutory notice dated 23 August 1988 pursuant to s 218 of the Companies Act 1965 by leaving it at the company's registered office but no payment was received since the service of that notice. Hence the petitioner filed the petition to wind up.

The respondent's application was supported by the affidavit of Chua Beng Thian, its managing director, who deposed that the transaction between the petitioner and the respondent (if any) was done in Kuching. In any case, he denied that the respondent was indebted to the petitioner and he further said that the respondent's witnesses are residing in Kuching.

Mr Lee, for the respondent, submitted that the issue before the court was whether this court had jurisdiction to entertain the petition or whether the forum convenience was Sarawak since the respondent is residing in Sarawak by having its registered office in Sarawak. He submitted that the petition is outside the jurisdiction of the court to entertain.

Mr Lee submitted further that the powers of the Malaysian judiciary are set out in art 121(1) of the Federal Constitution. It is in two High Courts — Malaya and Borneo. Under s 3 of the Courts of Judicature Act 1964, the local jurisdiction of the courts in Malaya are the Malay States and the Straits Settlements and the local jurisdic-